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No. 89-1068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Petitioner,

v.

INVESTORS MORTGAGE INSURANCE CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the trial court's announcement of its decision granting Defendant's Motion for Summary Judgment, which disposed of Plaintiff's entire case, but reserved the right to enter judgment and findings of fact and conclusions of law, constitutes the announcement of a final decision within the meaning of Federal Rule of Appellate Procedure ("F.R.A.P.") 4(a)(2).

2. If the answer to Question No. 1 is in the negative, whether a premature notice of appeal may be considered as if taken from a subsequently entered final order, absent prejudice to appellee.

3. Whether objections to proposed findings of fact and conclusions of law are implied F.R.A.P. 4(a)(4) tolling motions.

4. If the answer to Question No. 3 is in the affirmative, whether the trial court's subsequently entered Memorandum Opinion and Judgment should be construed to implicitly overrule the implied tolling motions in order to defeat the appeal.

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No. 89-1063

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Petitioner,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit was filed on September 26, 1989, and is not reported. It appears at p. A-1, *et seq.* of Petitioner's Petition for Certiorari. The opinion of the United States District Court for the Western District of Oklahoma was entered on March 3, 1989, is reported at 708 F.Supp. 1224 (W.D. Okla. 1989), and appears at pp. D-1 and E-1, *et seq.* of Petitioner's Petition for Certiorari.

JURISDICTION

This Court granted Petitioner's Petition for Writ of Certiorari on February 26, 1990, to review the judgment of the United States Court of Appeals for the Tenth Circuit. Jurisdiction of the Supreme Court is invoked under 28 U.S.C.S. §1254(1).

STATUTORY PROVISIONS AND APPELLATE RULES INVOLVED

1. Title 28 U.S.C.S. §1291 provides:

Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court or the District Court of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in §§1292(c) and (d) and 1295 of this title.

2. Federal Rule of Appellate Procedure ("F.R.A.P.") 4(a)(2) provides:

Appeal as of Right — When Taken

(a) Appeals in Civil Cases.

. . . .

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

3. F.R.A.P. 4(a)(4) provides:

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

STATEMENT OF THE CASE

FirsTier Mortgage Company, a/k/a Realbanc, Inc., ("FirsTier")[1] sued Investors Mortgage Insurance Company ("IMI") for refusal to honor eight private-mortgage-guaranty insurance policies. (J.A. p.4.)[2] IMI moved for summary judgment. (R. Doc. 106.)[3] On January 26, 1989, the trial court heard arguments on IMI's Motion for Summary Judgment. (J.A. p. 12.) On that date, the court announced its decision that all of the subject insurance policies were void for fraud, and that

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[1] FirsTier Mortgage Company's parent companies and subsidiaries are: FirsTier Financial, Inc.; FirsTier Bank, N.A., Omaha; FirsTier Bank, N.A., Lincoln; FirsTier Data Services, Inc.; FirsTier Leasing Co.; LeaseBanc Financial Corp.; FirsTier Services, Inc.; Asset Recovery Co.; DeLay First National Bank & Trust Co. of Norfolk; and FirsTier Brokerage Co.

[2] References to the Joint Appendix will begin with "J.A." followed by the page number in the Joint Appendix.

[3] References to the record below will begin with "R. Doc." followed by the document number as reflected on the docket sheet.

FirsTier's claim for punitive damages was moot. (J.A. pp. 26-28.) The court thereby disposed of FirsTier's entire action.

The court said, *inter alia:*

> I find that the policies should be and ***are cancelled*** as void for want of [sic] fraud, bad faith. The Court has heard no evidence in the matter of this hearing to change its mind from holding that the policies are void.
>
> Of course in a case of this kind, the losing party has a right to appeal. If the Court happens to be wrong, I don't think I am, but if the Court happens to be wrong, it could be righted by the Circuit.
>
> The Court does find that they relied on the package in each of these loans and the package was not honest. In fact it was dishonest. The dishonesty should and ***does*** void the policy. (J.A. p. 27.)
>
> . . . .
>
> MR. GRAY: May I assume that the bad faith claim, which was the other cause of action, is also moot at this point?
>
> MR. DAWSON: I would agree with counsel that ***if this action is dismissed, then the bad faith action must be dismissed along with it.*** I don't agree that it should be, but I agree with him in his legal interpretation that with this ruling, that this ruling would force the Court to do that.
>
> THE COURT: ***That will be the ruling.*** (J.A. p. 28.) (Emphasis added.)

The court directed counsel for both parties to submit their suggested findings of fact and conclusions of law for the court's use in preparing its Memorandum Opinion:

> Now, Mr. Gray, the Court will ask you to submit suggested findings of fact and conclusions as to each one of these loans, citing the evidence that you rely on and where it can be located. The Court will then look at what you submit as your suggestion and it is your suggestion only. The Court will then modify, add to it, delete and write its own findings of fact and conclusions of law and judgment in each of these eight policies that we have talked about.
>
> How much time do you want to submit this to the Court?
>
> MR. GRAY: Would ten days be inappropriate, Your Honor?
>
> THE COURT: That would be alright. You may submit to Mr. Dawson a copy of it for his review. And if Mr. Dawson cares to do so, within five days you may file with the Court your objection or suggestion wherein you find that the suggestions of Mr. Gray are in error, if you care to do so.

It is clear from a reading of the transcript and a review of the record below that the court and counsel for both parties treated the judge's announcement from the bench as a final decision.[4] The only thing that remained to be done was for the court to memorialize its decision in an order, with findings of fact and conclusions of law.

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[4] On February 10, 1989, IMI filed its Bill of Costs and Application for Attorney's Fees. (J.A. pp. 30 & 34.) IMI's Bill of Costs says: *"Judgment having been announced in the above entitled action on January 26, 1989. . . ."* (J.A. p. 34.) IMI repeatedly characterized itself as the prevailing party and as having achieved a complete and total victory on summary judgment. (J.A. pp. 30 & 39.) FirsTier objected to IMI's requests for attorney's fees and costs. (R. Doc. 155, 156 & 166.) IMI never raised the issue of the possible prematurity of FirsTier's appeal. The court of appeals raised this issue *sua sponte.*

On March 3, 1989, the trial court entered its Order and Judgment and Memorandum Opinion, with findings of fact and conclusions of law. (App. to Pet. for Cert. pp. D-1, E-1 *et seq.*)[5] The Order and Judgment rendered judgment in favor of IMI and against FirsTier. *Id.* A copy of the docket sheet reflecting the entry of the trial court's Order and Judgment and Memorandum Opinion is printed as Appendix F to Petitioner's Petition for Writ of Certiorari.

Pursuant to F.R.A.P. 4(a)(2), FirsTier filed its Notice of Appeal on February 8, 1989. (J.A. p. 54.) No tolling motions, as described in F.R.A.P. 4(a)(4), were filed.[6] FirsTier's Notice of Appeal should have been treated as if it had been filed immediately after the court entered its order memorializing its decision on March 3, 1989. F.R.A.P. 4(a)(2).

On April 10, 1989, counsel for FirsTier received the court of appeals' letter dated April 5, 1989 directing counsel to brief the jurisdictional issues described therein. (App. to Pet. for Cert. p. B-1.)[7]

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[5] References to items printed in the Appendix to the Petition of a Writ of Certiorari will begin with "App. to Pet. for Cert." followed by the page number in the Appendix where the documents can be found.

[6] After the court of appeals questioned its jurisdiction, IMI began to characterize FirsTier's proposed findings as F.R.A.P. 4(a)(4) tolling motions. The trial court's suggestions to counsel and the record as a whole do not support IMI's new characterization.

[7] Pursuant to F.R.A.P. 4(a)(5), on April 14, 1989, counsel for FirsTier filed its Application for Extension of Time to File Notice of Appeal from the trial court's March 3, 1989 Entry of Judgment. (J.A. p. 55.) We believed that the court announced a final decision from the bench on January 26, 1989. However, if our

On September 26, 1989, the United States Court of Appeals for the Tenth Circuit entered its order dismissing Appeal No. 89-6042 for lack of jurisdiction. The court of appeals found that "[t]he oral announcement by the district court on January 26, 1989, was not a final decision within the meaning of 28 U.S.C. §1291." (App. to Pet. for Cert. p. A-2.)

SUMMARY OF ARGUMENT

The trial court's oral announcement disposed of all of the issues as to all of the parties in the case. The announcement was a final decision. The fact that the trial judge intended to prepare written findings of fact and a written journal entry of judgment does not preclude finality of his decision. F.R.A.P. 4(a)(2) recognizes the distinction between the announcement of a decision and the entry of a judgment. The court of appeals should have treated FirsTier's Notice of Appeal as if it were filed immediately after judgment was entered pursuant to F.R.A.P. 4(a)(2).

Even if the oral announcement was not a final decision, the court of appeals should have taken the appeal. The Federal Rules of Procedure should be construed liberally to maintain a party's right to an appeal, not to defeat it. By the time the court of appeals questioned appellate

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understanding of the court's intent was in error, the error was excusable. The trial court agreed and granted FirsTier an extension of time until May 1, 1989 in which to appeal from the court's order entered on March 3, 1989. (J.A. p. 57.) FirsTier filed its Notice of Appeal from the March 3, 1989 Order on April 25, 1989, resulting in 10th Circuit Appeal No. 89-6145. (J.A. p. 58.) IMI appealed from the trial court's F.R.A.P. 4(a)(5) grant of an extension of time in which to appeal, resulting in Appeal No. 89-6150. (R. Doc. 182.)

jurisdiction, the trial court had entered its written judgment which disposed of all of the issues as to all of the parties. Equally important, the record reflects that the court and the parties treated the decision as final. IMI showed/claimed no prejudice from the February 8, 1989 Notice of Appeal. The parties waived the requirement of a separate, written judgment, because FirsTier filed its notice of appeal after announcement of the trial court's decision pursuant to F.R.A.P. 4(a)(2), and IMI never raised the issue of appellate jurisdiction. Instead, the court of appeals raised the issue *sua sponte*.

There were no F.R.A.P. 4(a)(4) tolling motions. Instead, FirsTier, following the court's suggestion, filed objections to IMI's suggested findings of fact and its own proposed findings of fact. The record reflects that the parties and the court never characterized FirsTier's proposed findings and objections to IMI's suggested findings as F.R.A.P. 4(a)(4) tolling motions. It was not until the court of appeals questioned appellate jurisdiction that IMI took the new position that the proposed findings were "implied" tolling motions. IMI took this new position just to defeat FirsTier's valuable right to an appeal.

The record does not suggest that the trial court's Memorandum Opinion and Judgment impliedly overruled the implied motions. There simply were no implied motions to impliedly overrule.

ARGUMENT

PROPOSITION I

THE TRIAL JUDGE ANNOUNCED A FINAL DECISION FROM THE BENCH ON JANUARY 26, 1989

FirsTier's complaint sought enforcement of eight policies of private-mortgage-guaranty insurance plus punitive damages for IMI's bad-faith refusal to honor the insurance policies. On January 26, 1989, the trial court announced its decision that all of the policies "should be and are cancelled as void." Then the trial court said that FirsTier's claim for punitive damages was moot.[8] The court's bench announcement extinguished FirsTier's entire complaint. The court's decision disposed of all of the issues as to all of the parties in the case and was, therefore, an announcement of a final decision. *Robert-Gay Energy Enterprises, Inc. v. State Corporation Commission of Kansas,* 753 F.2d 857 (10th Cir. 1985); *Sooner Products Company v. McBride,* 708 F.2d 510 (10th Cir. 1983); *Kasishke v. Baker,* 144 F.2d 384 (10th Cir. 1944). It has long been the rule that "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229, 233 (1945).

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[8] At the hearing on IMI's Motion for Summary Judgment, counsel for IMI recognized that FirsTier stated two causes of action: one for enforcement of the eight policies of insurance and a second for bad faith refusal to honor the policies. Counsel for IMI said that, if the court granted summary judgment on the issue of the enforceability of the policies, the court should also grant summary judgment on FirsTier's bad faith claim. (J.A. p. 18.)

A. As a Practical Matter, Trial Court's Announcement was a Final Decision. In *Gillespie v. U.S. Steel Corporation,* 379 U.S. 148 (1964), this Court gave a theme of practicality to the requirement of finality:

> [O]ur cases long have recognized that whether a ruling is "final" within the meaning of §1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this court has held that the requirement of finality is to be given a "practical rather than a technical construction."

As a practical matter, FirsTier's lawsuit against IMI was over when the court announced that the policies "should be and are cancelled. . . ." The court's decision was final and the court of appeals should have exercised jurisdiction over Appeal No. 89-6042 pursuant to F.R.A.P. 4(a)(2). See, e.g., *Acosta v. Louisiana Department of Health and Human Resources,* 478 U.S. 251, 254 (1986) (dicta); *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 463 (7th Cir. 1988); *Budde v. Ling-Temco-Vought, Inc.,* 511 F.2d 1033, 1036-1037 (10th Cir. 1975).

The court of appeals dismissed Appeal No. 89-6042 because it found that "[t]he oral announcement by the district court on January 26, 1989 was not a final decision within the meaning of 28 U.S.C. §1291." (App. to Pet. for Cert. p. A-2.) We do not know why the court of appeals thought the oral announcement was not a final decision.

IMI said the decision was not final because the trial court said that a memorandum opinion and judgment would follow its decision. IMI's argument, and the path chosen by the court of appeals, would render F.R.A.P. 4(a)(2) a nullity in a practical sense.

The 1979 amendment to F.R.A.P. 4(a)(2) recognizes the distinction between "announcement of a decision" and "entry of the judgment or order." The trial court also recognized the distinction when it announced its decision and told counsel that the decision would be followed by entry of a judgment. IMI's argument is inconsistent with F.R.A.P. 4(a)(2). The argument is also inconsistent with the record in this case.

B. Court and Parties Treated Announcement as Final Decision. In *United States v. F & M Schaefer Brewing Co.,* 356 U.S. 227 (1958), this Court looked to the record to determine whether the trial court's opinion constituted its final judgment in the case. In *Schaefer,* the trial court filed an opinion on April 14, 1955. Thereafter, on May 24, 1955, the trial court filed a document entitled "Judgment." On July 21, 1955, the petitioner filed its notice of appeal from the May 24, 1955 judgment. Respondent moved to dismiss the appeal as untimely, arguing that the April 14, 1955 opinion was the court's judgment. The court of appeals dismissed the appeal. 236 F.2d 889, 891. This Court reversed.

In *Schaefer,* this Court looked to the record to ascertain the intent of the court and of the parties to *maintain* the appeal. This Court emphasized the fact that the *respondent* presented the document entitled "Judgment" to the judge

for his signature. *Id.*, p. 229. This Court held that the opinion was not a "judgment" because the actions of all concerned — the court, the clerk, and counsel for the parties — indicated that none of them understood the opinion to be the final judgment in the case.

1. IMI Treated Decision as Final. This Court's reasoning in the *Schaefer* case should be used to maintain FirsTier's appeal. At the trial court level, IMI treated the trial court's announcement of its decision from the bench as a final decision on the merits. Two days after FirsTier filed its Notice of Appeal, IMI filed its Application for Award of Attorney's Fees and Bill of Costs. (J.A. pp. 30 & 34.) IMI's Bill of Costs is on a printed form. (R. Doc. filed February 10, 1989, unnumbered.) IMI revised the form (J.A. p. 34) to reflect that judgment was *announced* rather than entered, on January 26, 1989:

> "Judgment having been ~~entered~~ announced in the above entitled action on January 26, 1989. . . ."

Page 3 of IMI's Application for Attorney's Fees, filed on February 10, 1989, says: "IMI is clearly the prevailing party in the instant case since *judgment was entered in favor of IMI as a matter of law* and FirsTier took nothing by way of its Complaint." (J.A. p. 31.) (Emphasis added.) Also on page 3 of its Application For Attorney's Fees, IMI says that its Application is filed pursuant to Local Court Rule 6(E). (J.A. pp. 31 & 32.) The Rule in effect in 1989 provided that: "An application for costs, attorney's fees or both, submitted pursuant to this Rule shall be filed with the Clerk *not more than 15 days after the judgment is rendered (by notification or announcement of a decision)* or, in the alternative, not more than ten days after the formal entry of a written judgment, whichever is later." (Emphasis added.) Now the Rule says that an application for attorney's fees must be filed within 15 days after "*entry of judgment.*"

IMI's Motion For Attorney's Fees and Bill of Costs followed the trial court's announcement of its decision by exactly 15 days. Obviously, IMI thought the trial court announced a final decision on January 26, 1989. It filed its Application for Attorney's Fees on the date of the first deadline established by the local rules and before entry of the judgment.

IMI knows the difference between announcement of a final decision and entry of findings of fact and conclusions of law. This is further evidenced by its statements on page 5 of its Application for Attorney's Fees. (J.A. p. 32.) IMI asked that it "be granted leave to file a Supplementary Affidavit for additional attorney's fees within ten (10) days after this Court formally enters its Findings of Fact and Conclusions of Law." On March 15, 1989, IMI filed its Supplementary Application for Award of Attorney's Fees and Supporting Brief.[9] (J.A. p. 36.) On page 4 of its Supplementary Application; once again we see that IMI recognized the finality of the court's decision: "Counsel's efforts were obviously very suc-

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[9] In its response to FirsTier's Supplemental Brief filed in Appeal No. 89-6042, IMI said that its Supplementary Application was "protective" to assure that IMI's Application for Attorney's Fees was timely. IMI's statement is inconsistent with its statements on p. 4 of its Application for Attorney's Fees. (J.A. pp. 32 & 33.) IMI told the trial court that it wanted to file a Supplementary Application to cover its fees incurred in connection with preparation of the Attorney Fee Application and Findings of Fact and Conclusions of Law.

cessful considering that IMI's Motion For Summary Judgment was granted and FirsTier's claims were dismissed, thereby giving IMI a *complete and total victory."* (J.A. p. 39.) (Emphasis added.) The Affidavit of Mr. Eric S. Gray, Esq., attached to the Application, repeats that IMI "achieved a *complete and total victory* on Motion for Summary Judgment." (J.A. p. 44.) (Emphasis added.) The notations of time slip entries by Mr. Gregory F. Pilcher, Esq., an associate who worked on the file, also show that IMI thought that the court announced a final decision on January 26, 1989. Mr. Pilcher's January 26, 1989 time slip entry says, *inter alia:* "legal research re whether attorney fees are recoverable *by prevailing party."* (J.A. p. 49.) (Emphasis added.) On February 1, 1989, Mr. Pilcher made this entry: "Reviewed letter from client re publishing Court's Order. . . ." (J.A. p. 51.) On February 7, 1989, Mr. Pilcher made this entry: "Discussed procedure for publishing decisions with court clerk; drafted letters to Judge Bohanon requesting publication; Drafted letter to client explaining publication requirements." (J.A. p. 52.) IMI cannot seriously dispute that it thought the trial court announced a final decision on January 26, 1989.

2. Trial Court's Decision Meant to be Final. The trial court announced a final decision when it found that all of the policies "should be and are cancelled." (J.A. p. 27.) The trial court indicated his decision was final. When asked whether his ruling resulted in dismissal of both of FirsTier's causes of action, the judge said: "*That will be the ruling."* (J.A. p. 28.) (Emphasis added.)

After the court of appeals questioned jurisdiction, FirsTier filed an Application for Extension of Time to File Notice of Appeal. (J.A. p. 55.) In support of the Application, FirsTier said:

> We have recently learned that the Court of Appeals may be uncertain as to whether this court made a final decision in which it disposed of all of the issues as to all the parties, when it made its announcement on January 26, 1989. We believe that the Court's decision was final on that date. However, if our understanding of the Court's intent was in error, the error was excusable. . . .

IMI objected to FirsTier's Application. (R. Doc. 175.) The trial court agreed with FirsTier and granted FirsTier's Application. (J.A. p. 57.) As in the *Schaefer* case, the record reveals that the court and counsel for the parties understood that the trial court's oral announcement was a final decision. This Court should consider the court's and the parties' intentions and understandings to maintain FirsTier's appeal.

C. Entry of Judgment Not Essential to Final Decision. IMI advocates a mechanical application of the "separate-document" provision of F.R.C.P. 58 to defeat FirsTier's appeal. IMI's approach is inconsistent with the purpose of the 1963 amendment to F.R.C.P. 58 which contained the new "separate-document" rule. It is true, as explained by this Court in *United States v. Indrelunas,* 411 U.S. 216, 222, 223 (1973), that the rule is to be "mechanically applied" to avoid uncertainties over when a judgment is entered. But, in *Indrelunas,* this Court applied the separate-document provision to *maintain* an appeal. "The rule should be interpreted to prevent loss of the

right of appeal, not to facilitate loss." *Bankers Trust Co. v. Mallis,* 435 U.S. 381, 386 (1978). It is inconsistent with the purposes of the rule to apply it mechanically to *defeat* an appeal.

In *Bankers Trust,* this Court assumed, without so deciding, that the requirements of the Federal Rules of Civil Procedure for an effective judgment must be satisfied before §1291 jurisdiction may be invoked. *Id.* at 384, 385. In footnote 4, this Court gave the basis for its assumption:

> A "judgment" for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a "final decision" as that term is used in 28 U.S.C. §1291. Federal Rule Civ. Proc. 54(a), for example, provides that " '[j]udgment' as used in these rules includes a decree and any order from which an appeal lies." See also *Ex parte Tiffany,* 252 U.S. 32, 36, 40 S.Ct. 239, 240, 64 L.Ed. 443 (1920); 6A J. Moore, Federal Practice 58.02, pp. 51-52 (1972). Because Rule 58 provides that a "judgment is effective only . . . when entered as provided in Rule 79(a)," it is arguable that a decision must be entered on the civil docket before it may constitute a "final decision" for purposes of §1291. Unlike the separate-document requirement, however, the keeping of a civil docket pursuant to Rule 79 fulfills a public recordkeeping function over and above the giving of notice to the losing party that a final decision has been entered against it. A judgment of dismissal was entered in this case below. See n. 1, *supra.*

After *Bankers Trust,* F.R.A.P. 4(a)(2) was amended. With the 1979 amendment to F.R.A.P. 4(a)(2), it is clear that the Rules recognize the difference between announcement of a decision and entry of a judgment. In this case, the record

reflects that the court and counsel for both parties treated the court's bench announcement as a final decision.

IMI now says that the trial court's decision was not final because the trial court retained power to amend its judgment. (Brief of Respondent p. 17.) Of course, the Rules expressly recognize the retention of such power. *White v. New Hampshire Department of Employment Security,* 455 U.S. 445, 450 (1981). But it does not follow that the retention of such power precludes announcement of a final decision. If that were so, we could never have a final decision until after passage of the time to file post-decisional motions. IMI's approach would turn appellate practice on its head.

F.R.A.P. 4(a)(2) is virtually identical to F.R.A.P. 4(b) which governs appeals in criminal cases. F.R.A.P. 4(b) provides that, in criminal cases, a "notice of appeal filed after the announcement of a decision, sentence, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof." The Tenth Circuit recently considered F.R.A.P. 4(b) under circumstances virtually identical to this case in *United States of America v. Green,* 847 F.2d 622 (10th Cir. 1988).

In *Green,* the criminal defendant moved for dismissal of an indictment. On October 18, 1985, the court denied his motion. On the same day, the defendant entered, and the court accepted, a

conditional plea of guilty. Ten days later, the defendant filed his notice of appeal. Finally, on December 5, 1985, the court sentenced the defendant and entered its order of judgment.

The Tenth Circuit found that the saving provision in F.R.A.P. 4(b) allowed the defendant's notice of appeal to ripen after the court's judgment was finalized and entered. In reaching this conclusion, the court cited *United States v. Moore*, 616 F.2d 1030 (7th Cir. 1980), *cert. den.*, 446 U.S. 987, a case in which the Seventh Circuit assessed the impact of the 1979 amendments adding the saving provision to civil appeals in F.R.A.P. 4(a). The court in *Green* said, *inter alia*, that the purpose of establishing a saving provision for premature notices of civil appeals was to "extend to civil cases the provisions of Rule 4(b) dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely." *Green*, p. 624, quoting from Advisory Committee on Appellate Rules, 1979 Amendment, Note to Subdivision 4(a)(2).

As a practical matter, FirsTier's lawsuit was over when the trial court cancelled all of the insurance policies and dismissed FirsTier's action for punitive damages. The trial court and counsel for the parties treated the trial court's announcement as a final decision. The court of appeals should have recognized the finality of the trial court's decision. The court of appeals should have treated FirsTier's February 8, 1989 notice of appeal as if it had been filed immediately after the judgment was entered.

PROPOSITION II

EVEN IF THE TRIAL COURT'S ANNOUNCEMENT WAS NOT A FINAL DECISION, THE NOTICE OF APPEAL SHOULD HAVE BEEN TREATED AS IF FILED AFTER ENTRY OF THE ORDER, SINCE IMI CAN SHOW NO PREJUDICE

In *Foman v. Davis*, 371 U.S. 178 (1962), this Court considered an arguably premature notice of appeal. The district court entered judgment on December 19, 1960, dismissing the petitioner's complaint for failure to state a claim. On December 20, 1960, the petitioner moved to vacate the judgment and to amend the complaint. On January 17, 1961, the petitioner filed her notice of appeal from the December 19, 1960 judgment. On January 23, 1961, the district court denied the petitioner's motions to vacate the judgment and to amend her complaint. Finally, on January 26, 1961, the petitioner filed a second notice of appeal from the district court's denial of her motions.

In *Foman*, the court of appeals raised the issue of appellate jurisdiction *sua sponte*. The court of appeals dismissed the appeal from the December 19, 1960 judgment as premature because of the pendency of the petitioner's Rule 59 motion. The court of appeals said that the second notice of appeal was ineffective to review the December 19, 1960 judgment because it did not specify that judgment.

In *Foman*, this Court said that even if the first notice of appeal was premature, the court of appeals was in error in so narrowly reading the second notice. This Court recognized that the

defect in the second notice of appeal did not prejudice or mislead the respondent because respondent received the first notice of appeal and knew that the petitioner intended to seek review of both the dismissal order and the order overruling her motions. This Court said:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson,* 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L. Ed.2d 80. The Rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action." Rule 1.

A. IMI Not Prejudiced by "Early" Appeal. As in the *Foman* case, IMI can show no prejudice from FirsTier's first notice of appeal, even assuming that the notice of appeal was premature. IMI also treated the trial court's oral announcement as a final decision. As in the *Foman* case, the court of appeals raised the issue of appellate jurisdiction *sua sponte.* It was not until after the court of appeals raised the jurisdictional issue that IMI began to suggest that FirsTier's first notice of appeal was ineffective. IMI is just taking this new position to defeat FirsTier's valuable right to an appeal.

Under F.R.A.P. 4(a)(1), a notice of appeal in a civil case must be filed within thirty (30) days after the entry of the judgment from which the

appeal is taken. The thirty (30) day time limit is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56 (1978). However, this jurisdictional requirement must be considered in connection with the purpose of the rule. In *Browder v. Director, Department of Corrections of Illinois,* 434 U.S. 257, 264 (1978) this Court said:

> The purpose of the rule is clear: It is "to set a definite point of time when litigation shall be at an end unless within that time the prescribed application has been made; if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."

A strict application of the rule made sense in the *Browder* case. In *Browder,* the petitioner maintained, consistently, that the court of appeals lacked jurisdiction because the respondent's notice of appeal was filed approximately 90 days after the entry of a final order.[10] But a strict application of the rule in our case would not serve the purpose of the rule because IMI received FirsTier's notice of appeal within 12 days after the trial court announced its decision. IMI knew that it was *not* "free of FirsTier's demands." *Browder, supra.*

B. Findings of Fact and Conclusions of Law Not Jurisdictional Prerequisite for Appellate Review. IMI consistently argues that the trial court's decision was not final because the court said that a memorandum opinion and judgment

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[10] Respondent filed a post judgment motion which was arguably a "tolling" motion. However, respondent's motion was untimely.

would follow its oral announcement. Findings of fact and conclusions of law are not a prerequisite to appellate review of a decision granting summary judgment. F.R.C.P. 52. They are not a prerequisite to appellate jurisdiction. *Featherstone v. Barash,* 345 F.2d 246 (10th Cir. 1965); *First National Bank of Fort Smith, Arkansas v. Mattingly,* 312 F.2d 603 (10th Cir. 1962).

The trial court's oral findings and conclusions announced at the end of the January 26, 1989 hearing were sufficient to indicate the basis of the trial judge's opinion. Even in the absence of a formal judgment, the oral findings would have provided an adequate basis for appellate review. F.R.C.P. 52; *Milliner v. Government of the Virgin Islands,* 593 F.2d 532 (3rd Cir. 1979).

C. Rules Should be Interpreted to Maintain Appeals.

Even prior to the 1979 amendment to F.R.A.P. 4(a), this Court recognized that the requirement of a separate document in F.R.C.P. 58 is not intended to be such a categorical imperative that the parties are not free to waive it. *Bankers Trust Co. v. Mallis,* 435 U.S. 381 (1978). In *Bankers Trust,* the district court entered a memorandum opinion. Although the court did not enter a separate document entitled "judgment," the record reflected that both the parties and the trial court assumed that the case had been dismissed. The court of appeals raised the issue of appellate jurisdiction *sua sponte.* The court of appeals decided that because the trial court and the parties treated the memorandum opinion as a final judgment, the appellate court had jurisdic-

tion to consider the appeal despite the absence of a separate judgment. This Court agreed. The Court said at p. 385:

> The separate-document requirement was thus intended to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely. The 1963 amendment to Rule 58 made clear that a party need not file a notice of appeal until a separate judgment has been filed and entered. See *United States v. Indrelunas,* 411 U.S. 216, 220-222, 93 S.Ct. 1562, 1564-1565, 36 L. Ed.2d 202 (1973). Certainty as to timeliness, however, is not advanced by holding that appellate jurisdiction does not exist absent a separate judgment.

In *Bankers Trust,* this Court recognized that certainty as to the timeliness of an appeal does not prevent the parties from waiving the separate judgment requirement. The Court, quoting from Professor Moore, said at p. 386: *"The rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss."* (Emphasis added.)

The Tenth Circuit Court of Appeals has interpreted the Federal Rules of Procedure to defeat FirsTier's right to appeal. The purpose of the Rules, as announced by this Court, makes it clear that they should be interpreted to maintain a party's right to an appeal, not to defeat it. The separate-document requirement should be applied mechanically only if such an interpretation maintains an appeal. However, the parties

may also waive the requirement if the waiver maintains the appeal. *Indrelunas, supra; Bankers Trust, supra.* See dissenting opinion in *Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc.*, 479 U.S. 966 (1986).

In this case, the parties waived the separate-document requirement. Within exactly fifteen (15) days after the announcement of the trial court's decision, IMI filed its Motion for Attorney's Fees and Bill of Costs. The Bill of Costs says that judgment was *announced* on January 26, 1989. In its Motion for Attorney's Fees, IMI repeatedly characterized itself as the prevailing party. IMI did not raise the jurisdictional issue. Instead, the court of appeals raised the issue *sua sponte*. IMI has never attempted to explain how it would be prejudiced by FirsTier's February 8, 1989 appeal.

IMI now takes a new position. It advocates a strict interpretation of the Federal Rules of Procedure, in order to defeat FirsTier's valuable right to an appeal. Such a strict technical construction of the rules is contrary to the spirit of decisions of this Court and of the rules themselves. Even if the trial court's oral announcement was not a final decision, the court and the parties treated it as such and the court of appeals should have taken jurisdiction. *Bankers Trust, supra.*

In its Response Brief to FirsTier's Petition for Certiorari, IMI says that *Bankers Trust* does not apply because the clerk did not enter judg-

ment on the docket. (Brief of Respondent p. 12.) IMI's argument is inconsistent with F.R.A.P. 4(a)(2). IMI's argument is also inconsistent with the purpose of a civil docket. The keeping of a civil docket is a "public record keeping function." *Bankers Trust*, f.n. 4, p. 1119. Its purpose is separate from the purpose of a separate document, which gives notice to the losing party that judgment has been entered against it. *Id.* In our case, the trial court's oral announcement notified the parties of his decision. The fact that the clerk did not enter a "judgment" on a docket does not destroy the finality of the court's decision.

D. IMI's Case Law Authorities Do Not Apply. In its Response Brief to FirsTier's Petition for Certiorari, IMI quotes at length from *Carnes v. United States*, 279 F.2d 378 (10th Cir. 1960), for the proposition that the trial court's announcement was not a final decision because the court intended to enter a formal, written judgment. *Carnes* was decided prior to the 1963 amendment to F.R.C.P. 58.[11] The 1963 amendment to F.R.C.P. 58 made it clear that every judgment is effective only when set forth on a separate document and entered on the clerk's judgment docket. *Carnes* does not stand for the proposition that a trial court's announcement of its intention to enter written findings of fact and conclusions of law precludes finality of his announcement of a de-

[11] The *Carnes* decision has recently been questioned because it pre-dates the 1963 revision of F.R.C.P. 58. *Ferguson v. International Association of Bridge, Structural and Ornamental Iron Workers*, 854 F.2d 1169 (9th Cir. 1988). Its applicability to this case is also questionable.

cision on the merits. Instead, relying on the *Schaefer Brewing Company* case, the court in *Carnes* looked at the judge's intent and the parties' intent to *maintain* the appeal.[12]

IMI also cites *Century Laminating, Ltd. v. Montgomery,* 585 F.2d 563 (10th Cir. 1979), *cert. dismissed,* 444 U.S. 987 for the proposition that a judgment is not final where the trial court has power to further review the judgment.[13] Trial courts always have that power for a period of time, even after entry of judgment. *White, supra. Century Laminating* also does not apply to this case. In *Century Laminating,* the notice of appeal was premature because it was filed while a motion for J.N.O.V. and a motion for an injunction were pending. No. F.R.A.P. 4(a)(4) motion was pending in this case when FirsTier filed its notice of appeal.[14]

Another case cited by IMI is *General Television Arts, Inc. v. Southern Railway Co.,* 725 F.2d 1327 (11th Cir. 1984). *General Television's* facts

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[12] In *Carnes,* the court announced a decision from the bench on May 2, 1958. Sixteen months later, the court filed its findings of fact and conclusions of law. *Carnes* appealed from the written order. The court of appeals found that the notice of appeal from the written order was effective, because the record reflected that the trial court intended to enter a written order after it made its bench announcement. If *Carnes* applies at all, it supports FirsTier.

[13] The Tenth Circuit has recognized that, although *Century Laminating, Ltd.* pre-dates the 1979 amendment of F.R.A.P. 4(a), nevertheless, the case aptly expresses the rationale supporting the ongoing nature of proceedings when an F.R.A.P. 4(a)(4) motion is pending. *Federal Savings & Loan Insurance Corporation v. Huff,* 851 F.2d 316 (10th Cir. 1988).

[14] *Director of Revenue, State of Colorado v. United States,* 392 F.2d 307 (10th Cir. 1968), also cited by IMI, is also inapplicable. There, the 10th Circuit held that a Rule 59(b) motion, filed before entry of a judgment, suspended the time for filing a notice of appeal pursuant to Rule 73(a). If *Director of Revenue* applies

make it inapplicable to this case. *General Television* involved a notice of appeal filed after the trial court had entered a *partial* summary judgment on liability only.[15] In *General Television,* appellant tried to appeal from an interlocutory order. In our case, when the trial court announced its decision from the bench, it disposed of FirsTier's entire complaint on the merits. Even IMI said so at the trial court level. It repeatedly characterized itself as the prevailing party on the merits in its Motion for Attorney's Fees and Bill of Costs. The only purpose of IMI's change of position is to defeat FirsTier's appeal.

E. Court of Appeals' Decision Inconsistent With Tenth Circuit's "Forgiving Attitude" Toward Early Appeals. The Tenth Circuit Court of Appeals has recently adopted a "forgiving attitude" toward premature notices of appeal. *Federal Savings & Loan Insurance Corporation v. Huff,* 851 F.2d 316 (10th Cir. 1988); *Lewis v. B.F. Goodrich Co.,* 850 F.2d 641 (10th Cir. 1988). Both

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to this case at all, it supports FirsTier. In *Director of Revenue,* the court recognized that the rules must be liberally construed to promote the consideration of appeals on the merits. *Id.,* page 309. The court construed the rules and the record below to *sustain* the appeal.

[15] IMI cites four other cases which do not apply here because they concern appeals from non-appealable orders: *United States v. Hansen,* 795 F.2d 35, 38 (7th Cir. 1986) (Notice of appeal was filed before a final judgment was either announced or entered); *Robinson v. Tanner,* 798 F.2d 1378, 1382-83 (11th Cir. 1986) (Discovery orders are non-final and non-appealable); *Arthur Andersen & Co. v. Finesilver,* 546 F.2d 338 (10th Cir. 1977) (Discovery orders are non-final and non-appealable) and *Euziere v. United States,* 266 F.2d 88 (10th Cir. 1959) (Order vacating criminal conviction and reinstating case for trial is non-final and non-appealable). The other case relied upon by IMI, *Osterneck v. E.T. Barwick Ind., Inc.,* 825 F.2d 1521, 1527 (11th Cir. 1987), aff'd sub nom. *Osterneck v. Ernst & Whinney,* _____ U.S. _____ , 109 S.Ct. 987 (1987) does not apply because it concerns an appeal filed while a Rule 59(e) motion was pending.

FSLIC v. Huff and *Lewis v. B.F. Goodrich* were cases which, unlike ours, involved multiple claims, part of which were not adjudicated when the notice of appeal was filed. However, before the circuit dismissed the appeal, the district court had adjudicated all outstanding claims. The court found that F.R.A.P. 4(a)(2) permits the interpretation that the notice of appeal filed prematurely ripens and saves the appeal when all of the claims are finally adjudicated. And in *Lewis*, the court adopted the following approach:

> When the district court case is still ongoing at the time the appeal reaches this court's attention, two possibilities arise. One is that a belated Rule 54(b) certification has been obtained. In this situation, if the appellant obtains a 54(b) certification after the notice of appeal was filed, we will deem the notice of appeal to ripen as of the date of certification and will accept the jurisdiction pursuant to the savings provisions of Fed. R. App. P. 4(a)(2). The other possibility is that no Fed. R. Civ. P. 54(b) certification has been obtained. For this, we hereby adopt the practice of notifying the parties of our observation of our apparent jurisdictional defect and giving them a date certain by which to secure Rule 54(b) certification or an order or judgment explicitly adjudicating all remaining claims. If no certification, or final, dispositive adjudication, is obtained and presented to this appellate court by the specified date, the case will be dismissed summarily for lack of appellate jurisdiction.

In our case, the court of appeals directed the parties to file briefs on the jurisdictional issues by April 26, 1989. (App. to Pet. for Cert. p. B-1.) By

the time the briefs were due and filed, the trial court had disposed of all remaining claims by written judgments which were entered on the docket. On March 3, 1989, the trial court entered its Order and Memorandum Opinion with findings of fact and conclusions of law sustaining IMI's motion for summary judgment and disposing of FirsTier's entire Complaint. (App. to Pet. for Cert. pp. D-1, E-1.) On April 6, 1989, the trial court entered its written order granting IMI attorney's fees. (R.Doc. 170.)[16] The trial court made a final, dispositive adjudication of all claims in the case. The court of appeals' decision is inconsistent with its own recently adopted approach to F.R.A.P. 4(a)(2). Even when the oral decision fails to dispose of all issues as to all parties in the case, the Tenth Circuit has held that the premature notice of appeal ripens when a final order disposing of all issues is subsequently entered.

F. Other Circuits Also Forgive Early Appeals. Our court of appeals' decision is also in conflict with decisions of other circuits. See, e.g., *Dowling v. City of Philadelphia*, 855 F.2d 136 (3rd Cir. 1988) (Court of Appeals has power to take premature appeal where prematurity was cured shortly after filing notice of appeal by subsequently entered order). The Third Circuit noted the division in the circuit courts on this issue in *Dowling, supra*, footnote 2, page 138. See also *Sacks v. Rothberg*, 845 F.2d 1098 (D.C. Cir. 1988) (Premature notice of appeal vests court of ap-

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[16] On April 12, 1989, FirsTier filed a notice of appeal from the trial court's order awarding defendant its attorney's fees resulting in Tenth Circuit Appeal No. 89-6128. (R. Doc. 171.)

peals with jurisdiction once district court disposes, finally, of all matters pending before it, citing case law in accord from the Second, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits); *Rivers v. Washington County Board of Education,* 770 F.2d 1010 (11th Cir. 1985) (Motion to amend judgment filed after notice of appeal to reflect a final disposition of all claims as to all parties treated as a Rule 60, not a Rule 59 motion. Pursuant to F.R.A.P. 4(a)(2), notice of appeal deemed filed after entry of amended judgment.)

In *Diamond by Diamond v. McKenzie,* 770 F.2d 225 (D.C. Cir. 1985), the appellate court took jurisdiction despite the fact that a separate judgment had never been entered. Relying on *Bankers Trust,* the court construed the rules to maintain the appeal. The court said that the appellees, in effect, waived the separate judgment requirement because "it was this court, not the appellees, which raised the issue in the first instance." *Id.* p. 231. Appellees were unable to show that they were prejudiced by the lack of a separate document. *Id.* Lack of prejudice to the appellee was also noted as a factor to support appellate jurisdiction in *Knight v. Brown Transport Corp.,* 806 F.2d 479 (3rd Cir. 1986) (Premature notice of appeal taken from order which disposes of some but not all issues takes effect when order is amended to dispose of all issues, citing F.R.A.P. 4(a)(2), in the absence of a showing of prejudice to appellee), and in *Freeman v. Hittle,* 747 F.2d 1299 (9th Cir. 1984) (Certification of one of multiple issues for appeal was sufficient to validate premature notice of appeal, in absence of prejudice to appellee).

The trial court announced its decision to dispose of FirsTier's entire Complaint on January 26, 1989. The trial court's announcement was a final decision within the meaning of 28 U.S.C. §1291. On March 3, 1989, the trial court memorialized its decision in an order and judgment, with findings of fact and conclusions of law in a memorandum opinion. Even if the oral announcement was not a final decision, FirsTier's Notice of Appeal should have been deemed to be filed on March 3, 1989. F.R.A.P. 4(a)(2). The parties and the court treated the oral announcement as if it were a final decision and waived other technicalities. It was not until the court of appeals questioned appellate jurisdiction that IMI even began to suggest to the contrary. The court of appeals should have accepted jurisdiction pursuant to the saving provision of F.R.A.P. 4(a)(2).

PROPOSITION III

THERE WERE NO F.R.A.P. (4)(a)(4) TOLLING MOTIONS

At the conclusion of the January 26, 1989 hearing, the trial court asked counsel for IMI to submit suggested findings of fact and conclusions of law as to each of the loans. Then, addressing counsel for FirsTier, the court said "within five days you may file with the court your objection or suggestion *wherein you find that the suggestions of [counsel for IMI] are in error,* if you care to do so." (Emphasis added.) (J.A. p. 27.) On February 13, 1989, FirsTier filed its objection to IMI's suggested findings and its own proposed findings. Counsel for FirsTier did this to protect the record. Now IMI wants to characterize Firs-

Tier's proposed findings of fact and objections to IMI's suggested findings of fact as a request under F.R.C.P. 52(b) to make additional findings of fact or as an F.R.C.P. 59 motion to alter the trial court's January 26, 1989 judgment. IMI's characterization of the "implied motions" is unsupported by local practice and the record.

IMI repeatedly says that FirsTier's suggested findings assail the decision announced by the trial court. However, it is clear from the record that FirsTier was not asking the trial court to change his mind. FirsTier's objection says that FirsTier "objects to the suggested findings of fact and conclusions of law submitted by defendant, Investor's Mortgage Insurance Co., ("IMI"). . . ." (Brief for Respondent p. A-1.) FirsTier was not assailing the findings of the trial court at all. The trial court had not entered its memorandum opinion with findings of fact and conclusions of law when FirsTier filed its objection and suggested findings. How could FirsTier object to findings which did not yet exist?

F.R.C.P. 8(f) says that "all pleadings shall be so construed as to do substantial justice." IMI's characterization of the "implied motions" violates the spirit of the Federal Rules of Procedure. IMI's characterization would not result in substantial justice.

IMI's characterization is also inconsistent with local practice. Western District of Oklahoma Local Rule 14(A) says: "Any motion, application or objection which is not opposed in 15 days, as set out above, *shall* be deemed confessed." (Emphasis added.) If FirsTier's suggested findings and objections to IMI's suggested

findings were, in fact, F.R.C.P. 59 or 52 motions, IMI's written response to the "implied motions" would have been due by February 28, 1989. No such response is in the record. IMI would not have taken the risk of allowing its judgment to be overturned by default if IMI really thought that FirsTier had filed a "motion" under F.R.C.P. 52 or 59.[17] *Now IMI has changed its position in an attempt to defeat FirsTier's valuable right to an appeal.*

F.R.C.P. 52 recognizes the distinction between proposed findings of fact and conclusions of law and Rule 59 and Rule 52(b) tolling motions. The Rule addresses findings of fact and conclusions of law in subparagraph (a), and the tolling motions are addressed separately in subparagraph (b). In this case, the court and counsel for the parties also recognized the distinction. There is nothing in the record to suggest that anyone ever thought that FirsTier's suggested findings of fact and objection to IMI's suggested findings of fact were tolling motions. IMI adopted its new position only after the court of appeals questioned jurisdiction. IMI's new position is contrary to the spirit of the Federal Rules of Procedure, recent decisions of this Court and the record. IMI's new position should not be adopted by this Court to defeat FirsTier's appeal.

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[17] At page 20 of its Brief for Respondent, IMI says that FirsTier's suggested findings of fact and conclusions of law and objections to IMI's suggested findings of fact and conclusions of law "*must* be categorized either as a request under Rule 52(b) to amend or make additional findings of fact or a request under Rule 59(e) to alter or amend the judgment." (Emphasis added.) If that is so, then this Court should direct the trial court that it "must" grant FirsTier's "implied motions" by default for IMI's failure to timely respond pursuant to Local Rule 14.

PROPOSITION IV

TRIAL COURT'S MEMORANDUM OPINION AND ORDER DID NOT IMPLIEDLY OVERRULE IMPLIED MOTIONS

IMI also wants this Court to find that the trial court "impliedly overruled" FirsTier's "implied motions" which seek to alter the trial court's "implied interlocutory order." An appellate court must examine the entire record and the judgment itself to determine whether the judgment impliedly overrules all pending motions. See, e.g., *Lewis v. U.S. Postal Service,* 840 F.2d 712 (9th Cir. 1987); *Calculator's Hawaii, Inc. v. Brandt, Inc.* 724 F.2d 1332 (9th Cir. 1982). There is nothing in the record which indicates that either the trial court, FirsTier or IMI intended to treat FirsTier's proposed findings and objections to IMI's suggested findings as F.R.C.P. 52 and F.R.C.P. 59 motions. The record does not show that IMI responded to the "implied motions" or that the trial court ruled on the "implied motions."

IMI characterizes FirsTier's suggested findings as implied F.R.A.P. 4(a)(4) tolling motions. However, unless the trial court has ruled on the tolling motions, this Court could still preserve FirsTier's right to appeal by remanding the case to the trial court to rule on the implied tolling motions. *Bankers Trust, supra,* p. 385.[18] To avoid that possibility, IMI also wants this Court to infer that the trial court overruled the implied motions.

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[18] Of course, FirsTier does not advocate such a result. "Wheels would spin for no practical purpose." *Bankers Trust, supra,* p. 385.

IMI's argument stretches the record too thin. The argument also violates the spirit of the decisions of this Court and of the Federal Rules of Procedure. This Court should examine the record to determine the parties' and the court's intentions to maintain the appeal, not to defeat the appeal. In this case, there simply were no implied motions to impliedly overrule.[19]

CONCLUSION

The path chosen by the Tenth Circuit Court of Appeals would, in effect, render F.R.A.P. 4(a)(2) a nullity. IMI's position and the decision of the court of appeals are contrary to the spirit of the decisions of this Court and of the Federal Rules of Procedure. The Federal Rules of Procedure should be liberally construed to maintain a party's right to an appeal, not to defeat it. The court of appeals should have treated FirsTier's February 8, 1989 Notice of Appeal as if it were filed immediately after entry of the Memorandum Opinion and Order. F.R.A.P. 4(a)(2). This Court should reverse the decision of the court of appeals and remand this appeal to the circuit court for reinstatement.

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[19] IMI cites *Director of Revenue, State of Colorado v. United States,* 392 F.2d 307 (10th Cir. 1968), as authority for the proposition that the trial court's March 3, 1989 Order impliedly overruled the implied motions. *Director of Revenue's* facts make it inapplicable. There, the court liberally construed the rules to maintain the appeal. The court said that the pendency of a tolling motion before entry of a journal entry, and an order overruling the motion *after* entry of the journal entry *extended* the time for appeal. *Id.* pp. 308, 310. The court *expressly* overruled the tolling motion in a separate order. The other case cited by IMI for this proposition is *Agostino v. Ellamar Packing Co.,* 191 F.2d 576 (9th Cir. 1951). *Agostino* is also factually distinct. The trial court *expressly* denied the motion by a minute order.

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